

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
SPECIAL CIVIL APPLICATION No. 22418 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

HONOURABLE MS.JUSTICE H.N.DEVANI Sd/-

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1 Whether Reporters of Local Papers
may be allowed to see the
judgment ?

2 To be referred to the Reporter or
not ?

3 Whether their Lordships wish to see
the fair copy of the judgment ?

4 Whether this case involves a
substantial question of law as to
the interpretation of the
constitution of India, 1950 or any
order made thereunder ?

5 Whether it is to be circulated to
the civil judge ?

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GALAXY EXPORTS (100% EOU) - Petitioner(s)
Versus
UNION OF INDIA & 2 - Respondent(s)

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Appearance :

MR PR NANAVATI for Petitioner(s) : 1,
MR JITENDRA MALKAN for Respondent(s) : 1,
NOTICE SERVED BY DS for Respondent(s) : 2 - 3

HONOURABLE MR.JUSTICE D.A.MEHTA
CORAM :
and
HONOURABLE MS.JUSTICE H.N.DEVANI
Date : 16/12/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1 This petition primarily challenges order dated 26/8/2005 made by Central Excise and Service Tax Appellate Tribunal (CESTAT) on Stay Application No.E/S/599/2005 and order dated 22/9/2005 on Modification Application No.E/MA(Modification) 2451/05.

2 Mr.Malkan prays for time to file affidavit-in-reply. The said request is rejected for the reasons that follow, in light of the submissions made by Mr.Malkan.

3 Heard Mr.P.R.Nanavati, learned Advocate for the petitioner and Mr.Malkan for the respondents.

Considering the facts of the case and the controversy brought before the Court the matter is taken up for final hearing and disposal today.

Rule. Mr.Malkan waives service.

4 Grievance of the petitioner is that it filed an appeal before CESTAT against Order-in-Original dated 23/12/2004 made by the Commissioner of Central Excise. The appeal was accompanied by an application seeking stay of the demand. The Stay Application came to be rejected vide impugned order dated 26/08/2005. The petitioner preferred application seeking modification of the said order in the form of recall, but the said application was disposed of on merits of the Stay Application vide impugned order dated 22/9/2005.

5 The facts are not in dispute. The Stay Application filed by the petitioner was fixed for hearing on 23/8/2005. As the learned Advocate,

one Shri K.I.Vyas representing the petitioner before CESTAT was suffering from viral fever he moved adjournment application dated 22/8/2005 accompanied by a medical certificate. As can be seen from the said application (Annexure D) the same has been received by the Registry of CESTAT on 22/8/2005. However, the Tribunal instead adjourned the matter to 26/8/2005, and on the said day i.e. 26/8/2005 rejected the Stay Application by recording as under :

"None appeared for the appellant nor any request of adjournment has been filed".

The Stay Application was rejected for non prosecution directing the petitioner to deposit the entire due amount of Rs.1,30,26,680/- by 20/09/2005.

6 The petitioner thereupon moved an application styled as Misc. Application and in paragraph Nos. 2 and 3 of the said application the following averments have been made :

"02. The applicant submits that accordingly the matter was listed before this Hon'ble Court on 23/8/2005. However, due to heavy Malarial Fever the applicant's advocate was unable to attend this Hon'ble Court and therefore the request letter dated 22/8/2005 along with Medical Certificate was produced before this Court requesting for adjournment in the matter. The applicant submits that the Advocate of the applicant has not received any intimation of hearing from 23/8/2005 to 26/8/2005.

03. The applicant submits that the applicant received notice of hearing dated 23/8/2005 on 29/8/2005 from where it was found that the date of hearing was refixed from 23/8/2005 to 26/8/2005".

Finally, in paragraph No.5 the prayer made is :

"5. In the above premises, the applicant prays to set aside the order passed on the stay application on 26/8/2005 and grant any other date of hearing of the stay application afresh as the Hon'ble Court deems fit in the interest of justice".

7 When the matter came up for hearing on 22/9/2005 CESTAT records that the petitioner had filed Modification Application, and thereafter goes on to hold; *"We do not find any merits in the modification application. Prima facie the appellants do not have a good case on merits in their favour. It is seen that there is a duty demand of Rs.1,30,26,680/- and an equal amount of penalty has been imposed. We do not find any justification to allow the modification application and the same is, therefore, dismissed"*. The only change made in the earlier order is extension of time for making predeposit.

8 In light of the aforesaid facts Mr.P.R.Nanavati, learned Advocate appearing on behalf of the petitioner has submitted that the petitioner does not seek any relief as such except an opportunity of hearing at the hands of

CESTAT. He, therefore, urged that the impugned orders of CESTAT may be quashed and set aside and the petitioner be given an opportunity of representing its case in support of the Stay Application moved by the petitioner before the Tribunal.

9 Mr.Malkan, appearing on behalf of the respondent authorities has very vehemently opposed the prayer made on behalf of the petitioner on the specious plea that huge revenue is involved and CESTAT having passed an order on merits while rejecting Modification Application this Court should not intervene. Despite the fact that he is not representing CESTAT he sought to defend the impugned orders made by the Tribunal. It is in light of the submission that because of huge revenue involved that his prayer for granting time to file affidavit-in-reply has been rejected.

10 The facts stated hereinbefore go to show that CESTAT has failed to take into consideration the fact that it is a quasi judicial body and is expected to function in accordance with law, which would take within its sweep the principles of natural justice. This is a case where the classic adage: justice should not only be done but seen to be done: applies with full rigour.

11 In the first instance the Tribunal ought to have appreciated that it had incorrectly recorded the facts in its first order dated 26/8/2005 when it recorded that no request for adjournment had been filed without ascertaining whether the petitioner had been intimated about posting of the matter on 26/8/2005. In the application seeking recall of the order, the petitioner had categorically averred that the notice of hearing fixed on 26/8/2005 was received only on 29/8/2005. The fault lay with the Tribunal and the petitioner could not be

made to suffer for the same.

12 In the second instance when the petitioner moved Misc. Application seeking recall of the order dated 26/8/2005 and seeking an opportunity of hearing, the Tribunal termed the same as an application for modification and disposed of the same on merits. The application for recall and restoration having been wrongly labelled and treated as an application for modification by the Registry, CESTAT proceeded on such erroneous footing showing total non-application of mind. The Tribunal singularly failed to note that the so called date of hearing which was originally adjourned from 23/8/2005 to 26/8/2005 had never been intimated to the petitioner and that was the principal grievance made by the petitioner before it. In the Misc. Application seeking recall of the order the petitioner had categorically stated that the said notice had been received only on 29/8/2005 and therefore there could be no occasion for the petitioner to remain present on

26/8/2005 or move an application on 26/8/2005. The petitioner had made a specific prayer to the effect that the order made on 26/8/2005 may be set aside and the petitioner be heard on the Stay Application by granting another date of hearing. As can be seen from impugned order dated 22/9/2005 of the Tribunal, CESTAT has failed to deal with this aspect of the matter. In fact the said order does not even reflect what was the application moved by the petitioner before it and what was the prayer made therein.

13 At this stage, it is necessary to reiterate what has already been laid down by this Court in the case of *Sanghani Bright Steel vs. Union of India* (2005) 186 ELT 279 in relation to principles of natural justice and the requirement of issuance of notice of hearing:

"16. xxx xxx It is necessary for CESTAT

to bear in mind that under main provisions of the Central Excise Act, 1944 (the Act), it is empowered to hear and decide the appeal so as to finally adjudicate upon the rights of the parties viz. assessee and the department for the purpose of ascertainment of liability to duty or otherwise under the Act. Any decision which affects the rights of the parties, especially of an assessee, where the assessee is ultimately going to be called upon to pay duty has to take within its fold the principles of natural justice. In other words a party which is liable to be affected by the final outcome is required to be granted an opportunity of proper and reasonable hearing in accordance with law.

17. It is this fundamental principle which forms the basis of Rule 18 of the Rules. The said rule provides for date and place of hearing. Under sub-rule (1) of Rule 18 of the Rules it is provided that CESTAT shall notify the date and place of hearing of the appeal and/or application to the parties. Sub-rule (2) of Rule 18 of the Rules states that the issue of the notice referred to in sub-rule (1) shall

not by itself be deemed to mean that the appeal or application has been admitted. Therefore, when Rule 18 is read as a whole it envisages not only any notification of hearing on the notice board of CESTAT but issuance and service of individual notice to the party. Therefore, even under the Rules, it becomes necessary for CESTAT to ensure that proper notice, as may be prescribed, is issued and served on the parties. This would also take within its fold adequate notice. In other words notice should ensure that adequate time is available for either of the parties to make proper arrangement to appear and represent its case."

14 In the present case, the principal grievance of the petitioner is that when the matter was fixed on 23/8/2005 it had moved an adjournment application on account of sickness of its Advocate and the notice of hearing, adjourning the matter from 23/8/2005 to 26/8/2005 had been received by the petitioner only on 29/8/2005. Once this fact was placed on record in the form

of the Misc. Application filed before the Tribunal, CESTAT was duty bound to verify its own records, recall the order made ex parte and grant adequate opportunity of hearing to both the sides. The concept of adequate notice takes within its fold that adequate time is available for either of the parties to make proper arrangement and represent its case. It is unfortunate that the Tribunal, which is a quasi judicial body, fails to adhere to the requirement of law including principles of natural justice.

15 In the circumstances, impugned orders of the Tribunal dated 26/8/2005 and 22/9/2005 cannot be permitted to stand. Accordingly, both orders dated 26/8/2005 made in Stay Application No. No.E/S/599/2005 and order dated 22/9/2005 on Modification Application No.E/MA(Modification) 2451/05 are hereby quashed quashed and set aside. The Stay Application filed by the petitioner stands restored to file of CESTAT.

